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No. 91-176

In the Supreme Court of the United States

OCTOBER TERM, 1991

R.V. DOCTOR, INC., an Oregon Corporation; GEORGE E. THOMAS AND LINDA R. THOMAS, dba R.V. DOCTOR, PETITIONERS,

v.

GENERAL ELECTRIC CAPITAL CORPORATION, RESPONDENT.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

After concluding that petitioners had violated the terms of a financing agreement between the parties, GECC obtained an *ex parte* TRO restraining petitioners from selling or otherwise disposing of inventory in which GECC had a security interest. The post TRO show-cause hearing initially was scheduled to take place roughly one month after issuance of the TRO. During that time petitioners declined GECC's offer to negotiate a change in the TRO that would enable them to continue to sell inventory, failed to request an expedited hearing, and refused to engage in expedited discovery. Because discovery was not complete at the time of the scheduled hearing, the hearing was rescheduled for a month later. At that time petitioners stipulated to an indefinite continuation of the TRO. The question presented is:

Whether, under these circumstances, a delay in holding a show-cause hearing until two months after the issuance of an *ex parte* TRO violates the Due Process Clause of the Fourteenth Amendment.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

JUDGMENTS BELOW

The trial court's Findings of Fact and Conclusions of Law (Pet. App. 90-107) and its Foreclosure Judgment (*id.* at 108-124) are unreported. The court of appeals' order affirming the trial court's judgment without opinion (*id.* at 125-126) is reported at 105 Or. App. 414, 804 P.2d 1231. The Oregon Supreme Court's order denying review (*id.* at 127-128) is reported at 311 Or. 349, 811 P.2d 144.

JURISDICTION

The Oregon Supreme Court's order denying review was entered on April 30, 1991. The petition for a writ of certiorari was filed on July 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. For

reasons explained more fully below, petitioners' failure to raise in timely fashion the federal constitutional claim presented here deprives this Court of jurisdiction to review the judgment of the Oregon Court of Appeals in this case.

STATEMENT

A. The Parties

Respondent General Electric Capital Corporation ("GECC") is a corporation specializing in the making of commercial loans.[1] During the relevant time period, petitioner George Thomas, operating under the trade name R.V. Doctor, was in the business of purchasing new and used recreational vehicles and reselling them to consumers.[2] Thomas financed his acquisition of such vehicles by means of loans from GECC and other lenders.

B. The Contractual Relationship Between The Parties

On September 15, 1986, Thomas entered into an Inventory Financing Agreement ("IFA") with GECC. Contemporaneously, he executed an addendum to the IFA, a UCC financing statement, and a personal guaranty in favor of GECC. Pet. App. 91-92. Pursuant to the terms of the IFA and its addendum, GECC provided financing to Thomas for the purchase of new recreational vehicles to be resold to the public. *Id.* at 93.

The IFA and the financing statement together served to give GECC a security interest both in GECC-financed vehicles and in all other vehicles owned by Thomas. Un-

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[1] GECC is a wholly owned subsidiary of General Electric Financial Services, Inc., which in turn is a wholly owned subsidiary of General Electric Company. GECC has no non-wholly owned subsidiaries in the United States that have publicly traded shares or debt securities.

[2] For simplicity's sake, and because George Thomas was the principal actor on behalf of petitioners, we will refer to all petitioners collectively as "Thomas."

der the terms of the IFA, each time Thomas sold a GECC-financed vehicle he was obliged to repay GECC the amount financed and to hold all proceeds of the sale in trust for GECC until such repayment was made. Failure to do so—known in the trade as a "sale out of trust"—constituted a default under the IFA and entitled GECC to immediate possession of all remaining inventory in which it held a security interest. Pet. App. 93. A sale out of trust is a serious matter for lenders because it reduces the collateral securing the loan.

C. Thomas's Breaches Of The IFA

In order to ensure that inventory financing borrowers comply with their obligation not to make sales out of trust, GECC reserves the right to conduct periodic inspection of the borrowers' inventory. In accordance with this contractual entitlement, GECC employees periodically inspected Thomas's inventory of GECC-financed recreational vehicles. Pet. App. 93-94. Notwithstanding this safeguard, Thomas repeatedly violated the prohibition against sales out of trust and actively attempted to conceal these violations from GECC. As the trial court expressly found, "commencing in February 1987, Mr. Thomas's authorized employees made repeated misrepresentations to GECC's inspectors for the purpose of causing them to believe that units sold and paid for were in fact unsold." *Id.* at 94.

In December 1987, GECC received a tip from a former R.V. Doctor employee that GECC-financed vehicles for which GECC had not been repaid were missing from the R.V. Doctor lot. The former employee further stated that when employed by Thomas he had been instructed to tell GECC inspectors that missing GECC-financed vehicles were at fairs or at the factory being repaired when in fact they had been sold out of trust. Pet. App. 95.

On December 16, 1987, GECC employee Julie Englund went to the R.V. Doctor lot to investigate the former employee's tip. Ms. Englund discovered that six GECC-

financed vehicles were missing from the lot. Respondents have subsequently admitted that each of those vehicles had been sold out of trust. Pet. App. 95-96. At the time Ms. Englund discovered the out-of-trust sales, petitioners owed GECC $121,356.74 in principal alone in connection with the financing of the six missing units. Tr. 208; P. Ex. 15.

D. GECC's Efforts To Protect Its Security Interest By Obtaining A Temporary Restraining Order

On December 17, 1987, GECC's attorney notified Thomas's counsel that later that day GECC would seek a temporary restraining order ("TRO") preventing Thomas from selling or otherwise disposing of any units in which GECC had a security interest without court approval. Thomas's counsel indicated that he would be unable to appear in court that afternoon. Pet. App. 97-98.[3] Pursuant to its rights under Oregon law, GECC filed a sworn petition for a TRO in state court on December 17. Finding "probabl[e] cause to believe that immediate and irreparable injury, damage or loss to [GECC] is imminent," the court granted a TRO on the condition that GECC post a bond in the amount of $10,000 to cover damages "incurred or suffered by any party who is found to have been wrongfully enjoined or restrained * * *." *Id.* at 29.

The TRO required Thomas to appear at a hearing to show cause why the property that was the subject of the order should not be permanently delivered to GECC. Pet. App. 32. Rule 83(G)(1) of the Oregon Rules of Civil Procedure provides that such hearings are to take place between three and seven days after service of the TRO unless the plaintiff requests that the hearing be held at a later date. Pursuant to that provision, GECC

[3] The record reflects that Thomas's counsel elected to attend an aerobics class instead of the hearing on the temporary restraining order. Tr. 625-626.

requested that the show-cause hearing be set more than seven days after service of the TRO. The court accordingly set the hearing for January 19, 1988. Pet. App. 32.

E. Subsequent Proceedings

Immediately after the issuance of the TRO on December 17, the parties agreed to meet the following morning to discuss ways of modifying the TRO to facilitate Thomas's continued sale of recreational vehicles, while still protecting GECC's rights. Pet. App. 98. The parties and their counsel did meet briefly the following morning, but petitioners' counsel terminated the meeting, stating essentially that the TRO had already, in the few hours it had been in existence, effectively put petitioners out of business. Tr. 390-392. Accordingly, no modification was pursued. Pet. App. 99.

Negotiation having failed, GECC's counsel proceeded to seek expedited discovery in order to be prepared for the scheduled January 19 hearing. However, Thomas's counsel declined to engage in expedited discovery. As a result, by January 14, 1988 the key witnesses had not been deposed and Thomas had yet to turn over the critical documents to GECC. Pet. App. 36-47, 48 (transcript of Jan. 14, 1988 hearing). On that day, the court held a hearing to resolve the discovery dispute. At the hearing, Thomas's counsel continued to oppose expedited discovery, insisting that he receive the full 30-day notice period for depositions (see Or. R. Civ. P. 39.A, 7.C(2)) and 45-day period for responding to document requests (see Or. R. Civ. P. 43.B) provided under Oregon law. Pet. App. 48-49. As a result, GECC moved for a postponement of the show-cause hearing because petitioners' refusal to provide any discovery made the scheduled January 19 date infeasible.

The court ordered reciprocal discovery on an expedited basis and granted a postponement of the hearing, in part because of the delay in conducting discovery and in part

because of some unanticipated changes in the court's own schedule. Pet. App. 59-61. After the parties conferred with the docket clerk regarding dates that were convenient to all parties and the court, the hearing was rescheduled to February 23, 1988.

On that date, the parties stipulated to the continuation of the TRO as to specified units. Pet. App. 64-69.[4] The agreement permitted, but did not require, GECC to repossess and dispose of most of the specified units and to apply the proceeds against the debt those units secured. *Id.* at 67. The agreement also permitted other creditors to repossess vehicles that they had financed and that initially had been subject to the restraining order. *Id.* at 66. Finally, the agreement provided that petitioners did not waive their claims for conversion, wrongful restraint, and commercially unreasonable sale or disposition of the collateral. *Id.* at 68-69.

F. The Decisions Below

On April 4, 1989, the parties went to trial on GECC's claims against petitioners and six counterclaims by petitioners against GECC. The six counterclaims, as characterized in petitioners' amended answer, were: (1) breach of contract; (2) trespass of chattels; (3) conversion; (4) abuse of civil process; (5) declaratory judgment (that GECC's disposition of the collateral was com-

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[4] The key provision of the order embodying the stipulation is paragraph 5, which provides:

> The provisions of the Temporary Restraining Order and Order to Show Cause herein shall continue *in effect as to all of the recreational vehicle units listed* in Exhibit 1 attached hereto and incorporated herein by reference as if fully set forth, until such time as the same have been repossessed by or on behalf of plaintiff or until further order of this court.

The italicized portion appears to have been inadvertently omitted from petitioners' Appendix.

mercially unreasonable); and (6) accounting. None of the six counterclaims in the amended answer invoked 42 U.S.C. § 1983, the federal Constitution generally, or the Due Process Clause of the Fourteenth Amendment in particular. Nor did the counterclaims demand relief, even under state law, on the basis of the delay in holding the show-cause hearing.

Following trial, the court ruled in favor of GECC on its claims against petitioners, finding Thomas "in default" under the IFA. Accordingly it held that GECC was "entitled to relief pursuant to its prayer for foreclosure." Pet. App. 102. Because the trial court found that Thomas was "in default" and that GECC "was entitled to relief pursuant to its prayer for foreclosure," it is plain that petitioners suffered no harm as a result of the delay in holding the show-cause hearing.

The court then proceeded to reject each of petitioners' substantive counterclaims.[5] The court rejected the breach of contract claim out of hand. Pet. App. 103. It rejected the conversion and trespass claims as unsupported by the evidence. *Id.* at 102. It also held, "as a matter of [Oregon] law," that the evidence did not support an abuse of process claim. *Id.* at 104. Citing two Oregon Supreme Court decisions, it explained that the evidence "establishes neither an ulterior purpose nor a willful act in the use of process not proper in the regular conduct of the proceeding." *Ibid.* Finally, the court found no merit in petitioners' request for a declaration that GECC's disposition of the collateral was commercially unreasonable. *Id.* at 105-106.

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[5] On the accounting counterclaim, the court held that petitioners were entitled to $5,939.91, but stayed its judgment because that entire amount was likely to be more than offset by the amount of attorneys' fees and costs to be awarded to GECC. Pet. App. 106.

Petitioners appealed to the Oregon Court of Appeals, contending, *inter alia*, that the timing of the show-cause hearing violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. GECC pointed out that this issue had not been timely raised before the trial court. The court of appeals subsequently affirmed the trial court's judgment in all respects without written opinion.

Petitioners then sought review in the Oregon Supreme Court. Again, they attempted to raise a federal due process challenge to the timing of the hearing, and again GECC pointed out that that claim had not been preserved in the trial court. The Oregon Supreme Court denied review.

REASONS FOR DENYING THE PETITION

I. PETITIONERS DID NOT TIMELY RAISE, AND THE STATE COURTS DID NOT DECIDE, THE FEDERAL DUE PROCESS ISSUE PRESENTED HERE

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981).[6] To effectuate this ex-

[6] The policies underlying this settled jurisdictional principle are well understood. First, if the federal issues have not been properly raised in the state courts, "the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." Second, principles of federalism mandate "that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality." Finally, if it had been clearly presented below, the federal issue might have "be[en] blocked" by the state courts on an adequate and independent

tremely important jurisdictional rule, this Court's Rule 14.1(h) requires that petitions seeking review of state court judgments contain an express statement of how and when the federal issue was raised and resolved in the state courts.[7] Petitioners have wholly failed to comply with the requirements of Rule 14.1(h). Nowhere in their statement of the case do they specify the stage in the proceedings at which they first raised the federal question presented here. Nor do they state "the method or manner of raising" that question. The reason is that they did *not* raise a due process challenge to the timing of the show-cause hearing until *after* trial. In Oregon, that is clearly too late. See Or. R. App. P. 5.45(2); *Douglas Nat'l Bank* v. *Becker*, 102 Or. App. 143, 146, 792 P.2d 1246, 1248 (1990).

None of petitioners' counterclaims even hinted at a federal issue; indeed all were predicated upon principles of state law. Moreover, none of the counterclaims even remotely suggested that it was the *timing* of the show-cause hearing—as opposed to the issuance of the TRO in the first place or other actions of GECC not at issue here—that petitioners were contesting. For example, the

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state ground, thereby rendering review by this Court unnecessary. *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

[7] Specifically, the Rule provides, in relevant part:

> If review of a judgment of a state court is sought, the statement of the case shall * * * specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears * * * as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

critical allegation in the trespass counterclaim was that "the [petitioners] were entitled to immediate possession of the units and/or keys to the units * * *. [GECC and/or its employees] took the keys to units numbered 1-51 with intent to interfere with the [petitioners'] right to possession of said units and/or keys to said units." Defendants' Amended Answer ¶ 60. Similarly, the core allegation in the conversion counterclaim was that "the [petitioners] maintain an ownership interest in [enumerated units] * * *. [GECC and/or its employees] took the keys to said units with intent to permanently deprive [petitioners] of their ownership interest and right to immediate possession of said units." *Id.* ¶ 63. Finally, the central allegation for the abuse of process counterclaim was:

> [GECC] obtained [the] temporary restraining order without a lawful basis * * *. [GECC's] actions in obtaining this restraining order without a lawful basis were willful and [were] not proper in the regular conduct of such proceedings; and was * * * a form of coercion to obtain a collateral advantage not properly included in these proceedings, and was done with the ulterior purpose of attempting to pressure or coerce [petitioners] into waiving any claims against [GECC] for its improper conduct * * *.

Id. ¶ 66.

Not surprisingly, in view of the fact that the counterclaims did not contest the timing of the hearing and gave no indication that petitioners were invoking the Due Process Clause of the Fourteenth Amendment, the trial court rejected the counterclaims without even mentioning, let alone resolving, the federal constitutional issue presented here. Indeed, the court's findings of fact and conclusions of law focused expressly and exclusively on state law. For example, in rejecting the abuse of process claim (which is the only one of petitioners' counterclaims that even arguably approaches the issue raised here), the court concluded:

> The evidence presented does not, as a matter of law, constitute a claim for abuse of process. It establishes neither an ulterior purpose nor a willful act in the use of the process not proper in the regular conduct of the proceeding. *Kelly v. McBarron*, 258 Or 149, 154 (1971); *Larson v. Credit Bureau*, 279 Or 405 (1977).

Pet. App. 104. So plain is it that no federal constitutional challenge to the timing of the show-cause hearing was timely raised or decided in the trial court that the court of appeals affirmed the trial court's judgment without even issuing an opinion. When the state courts have not expressly ruled on a federal constitutional claim, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the [petitioner] can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). See, *e.g.*, *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983) (concluding that this Court lacked jurisdiction where state's highest court did not address federal claim, and an examination of the trial court's opinion revealed that that court had not decided the issue).

Because petitioners did not timely raise, and the state courts did not resolve, the federal due process issue presented here, the petition for certiorari must be denied.

II. PETITIONERS' PROCEDURAL DUE PROCESS CHALLENGE TO THE TIMING OF THE SHOW-CAUSE HEARING IS WHOLLY INSUBSTANTIAL.

This Court has indicated that when, as here, state law permits the *ex parte* issuance of a prejudgment remedy against a debtor, due process generally requires that the debtor be given an "early opportunity to put the creditor to his proof." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 609 (1974).[8] The gist of petitioners' constitutional claim

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[8] Some kinds of prejudgment remedies are so onerous to the party against whom they are invoked that only a pre-

is that Or. R. Civ. P. 83(G)(1) violates due process because, *as applied in this case*, it prevented them from having "an early opportunity" to put GECC to its proof.

This Court has not had occasion to determine the amount of time within which a post-deprivation hearing must occur in order for the prejudgment remedy procedure to pass constitutional muster, but the present case is certainly the wrong vehicle in which to begin that necessarily case-by-case inquiry. See generally *Mitchell*, 416 U.S. at 610 (this Court will "[c]onsider[] the [State's] procedure as a whole" in determining whether "the State has reached a constitutional accommodation of the respective interests of [debtor and creditor]"). From the very moment they were aware that GECC would seek a TRO, petitioners and their counsel engaged in a course of conduct that was squarely inconsistent with their present assertion that they wanted an immediate hearing.

First, petitioners' counsel was afforded the opportunity to appear in court when the request for TRO was pre-

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remedy hearing will satisfy due process. See, *e.g.*, *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991) (provision permitting prejudgment attachment of tort defendant's property); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (prejudgment replevin statute); *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment procedure). However, when, as here, the creditor has a property right in the property at issue and the debtor's continued unfettered control over the property might serve to permanently deprive the creditor of its property right, a pre-deprivation hearing is not necessary as long as other safeguards, including a timely post-deprivation hearing, are available. See *Mitchell*, 416 U.S. at 609; see also *Doehr*, 111 S. Ct. at 2115. Petitioners do not deny that Oregon affords the other kinds of safeguards necessary to ensure that a state's prejudgment remedy procedure comports with due process—*e.g.*, the requirement that the moving party post a bond and the establishment of a judge (rather than a sheriff or notary) as decisionmaker. See *Mitchell*, 416 U.S. at 616, 620 n.14; *Doehr*, 111 S. Ct. at 2116-2119 (plurality opinion).

sented, but passed it up in order to attend an aerobics class. Had he appeared at that hearing or sent a replacement, he could have contested the allegations upon which the petition for TRO was based as well as GECC's request to hold the show-cause hearing more than seven days after issuance of the TRO.

Second, when presented the next morning with an opportunity to negotiate a modification of the TRO that would have enabled petitioners to continue selling recreational vehicles, while at the same time protecting GECC's security interest,[9] petitioners and their counsel declined to negotiate, stating that the TRO already (in less than 24 hours) had put them out of business. If petitioners really were concerned that postponing the hearing would cause them harm, they should have taken the opportunity that was presented to them to mitigate the effects of the TRO.

Third, even after they declined to engage in negotiations to ameliorate the effects of the TRO, petitioners retained the option of filing a motion informing the court that the delay was harming them and requesting an expedited hearing. They never did so.[10]

Fourth, by refusing to engage in expedited discovery, petitioners themselves directly contributed to more than half of the delay they challenge here. GECC attempted

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[9] For example, the TRO could have been modified to permit petitioners to sell vehicles on the condition that payment be made either directly to GECC or into an escrow account that would be applied against petitioners' debt.

[10] By failing to try this route, petitioners have deprived the Oregon courts of the opportunity to interpret their own procedures; they instead ask this Court to *assume* that the Oregon courts would have selected an interpretation that would have rendered those procedures subject to constitutional question. This Court typically declines such invitations. See *Cardinale*, 394 U.S. at 439.

to obtain the necessary documents and take the necessary depositions two weeks in advance of the original hearing date, but petitioners insisted that they be given the full 45-day period for responding to document requests and 30-day notice period for depositions that are provided for under Oregon law. They gambled that by refusing to engage in expedited discovery they could force GECC into a hearing for which it was not prepared. They now are hardly in a position to complain about the court's decision to reschedule the hearing so that discovery could be completed.

Finally, after all was said and done, petitioners voluntarily stipulated to a continuation of the TRO well beyond the scheduled February 23 hearing date. That act is squarely inconsistent with their present assertion that they desired an immediate hearing.

Thus, the delays in this case and the harm (if any) stemming from them are as much a product of the petitioners' strategic behavior as anything else. This plainly is the wrong case in which to make new law on the issue of how prompt a post-deprivation hearing must be in order to comport with due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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